

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ADRIAN FULLER,

Plaintiff,

v.

MICHAEL CHERTOFF, Secretary of the
Department of Homeland Security, and
THOMAS W. HARDY, Director of Seattle
Field Office, Customs and Border Protection,
Department of Homeland Security,

Defendants.

CASE NO. CV05-1308RSM

ORDER DENYING MOTION
TO COMPEL

This matter comes before the Court on plaintiff's Motion to Compel. (Dkt. #14). Plaintiff, Adrian Fuller, is a former employee of the Bureau of Customs and Border Patrol ("CBP"). In his complaint, plaintiff alleges that defendants discriminated against him based on his race, in violation of 42 U.S.C. § 2000e.

Plaintiff seeks discovery of all 21 pages of handwritten notes taken by Linda Barnett, an Equal Employment Opportunity ("EEO") employee of the CBP. Defendants withdrew their claim of privilege as to the first 18 pages because those notes were the "literal transcription of statements" made by plaintiff to Ms. Barnett. (Dkt. #16 at 3). The present motion concerns the three remaining pages of Ms. Barnett's notes (AF000086-88). (Dkt. #16 at 2).

Plaintiff argues that he is entitled to discovery because the notes are not work product and such notes are part of the EEOC investigation and public information. Defendants assert that the three pages recording Ms. Barnett's conversation with plaintiff's former supervisor, Phil

1 Stanford, and her analysis of plaintiff's claims were created because of the prospect of litigation
2 and is therefore entitled to work product protection.

3 Having reviewed plaintiff's motion, defendants' response, and the remainder of the record,
4 the Court hereby ORDERS:

5 (1) Plaintiff's Motion to Compel (Dkt. #14) is DENIED. The work product doctrine
6 protects from discovery, documents and tangible things prepared by a party or his representative
7 in anticipation of litigation. Fed. R. Civ. P. 26(b)(3). The Ninth Circuit adopts the "because
8 of" standard to determine whether a document is entitled to work product protection. *In Re*
9 *Grand Jury Subpoena (Mark Torf / Torf Envtl. Mgmt.)*, 357 F.3d 900, 907 (9th Cir. 2004).
10 Under this standard, a document prepared in anticipation of litigation is protected as work
11 product under Rule 26(b)(3) if the document can fairly be said to have been prepared or
12 obtained because of the prospect of litigation. *Id.* If similar documents would have been
13 created whether or not litigation was anticipated, then "it [cannot] fairly be said that they were
14 created 'because of' actual or impending litigation." *Willingham v. Ashcroft*, 228 F.R.D. 1
15 (D.D.C. 2005).

16 Ms. Barnett prepared her notes because plaintiff initiated an EEO complaint. (*See* Dkt.
17 #18). *Willingham*, involving a Title VII action against the Drug Enforcement Administration by
18 a former employee, is instructive. *Id.* There, the district court found that the documents
19 requested were created in reasonable anticipation of litigation since they were prepared
20 "because of or in preparation for a potential challenge . . . either to the [Merit Systems
21 Protection Board] or through EEO proceedings[.]" *Id.* at 5. The court reasoned that the
22 employee's MSPB appeal and EEO complaint constituted "adversarial proceedings." *Id.* That
23 is, if EEO proceedings resulted in a favorable determination to the agency, plaintiff would likely
24 sue. *Id.* Therefore, notes created because of EEO proceedings were prepared in reasonable
25 anticipation of litigation and protected as work product.

26 As defendants' employee, Ms. Barnett is a party representative, and her job is to provide
advice to CBP management concerning EEO complaints. The three pages at issue here involve

1 Ms. Barnett's discussion with Mr. Stanford, plaintiff's former supervisor and CBP manager.
2 Ms. Barnett declares that her notes, "especially the notes of the conversation with Mr. Stanford,
3 were analysis of Mr. Fuller's claims." (Dkt. #18 at 2). The discussion and analysis would not
4 have occurred were it not for the pending adversarial EEO complaint. These notes were
5 created "because of" potential litigation, and are entitled to work product protection.

6 This Court is not persuaded by plaintiff's argument that he is also entitled to those notes
7 because they are part of the EEOC investigation and public record. "[M]aterials assembled in
8 the ordinary course of business, or pursuant to public requirements unrelated to litigation, or for
9 other nonlitigation purposes" are not protected. Fed. R. Civ. P. 26(b) advisory committee's
10 note (1970 amendment). However, "when a complaint is filed with an agency EEO office, it
11 has to follow that the work done thereafter is done in anticipation of any litigation that would
12 follow if the claim is not administratively resolved." *McPeck v. Ashcroft*, 202 F.R.D. 332, 339
13 (D.D.C. 2001) (concluding that documents made by an agency's EEO office after an employee
14 lodged an administrative complaint of sexual harassment were made in anticipation of litigation
15 and not in the ordinary course of business). Ms. Barnett recorded conversations and her
16 analysis in response to plaintiff's EEO complaint. Such notes, therefore, were created in
17 anticipation of litigation and not in the ordinary course of business.

18 Even if this argument was not foreclosed by *McPeck*, the notes would still be entitled to
19 work product protection because "taking into account the facts surrounding their creation, their
20 litigation purpose so permeates any non-litigation purpose that the two purposes cannot be
21 discretely separated from the factual nexus as a whole." *In Re Grand Jury (Torf)*, 357 F.3d at
22 910.

23 Since the notes are protected work product, plaintiff bears the burden of showing a
24 "substantial need" for the documents and his inability to obtain the substantial equivalent of the
25 notes without undue hardship. Fed. R. Civ. P. 26(b)(3). Plaintiff has not demonstrated either of
26

1 these factors.¹ Accordingly, the remaining three pages and the redacted comment are protected
2 work product and are not subject to discovery.

3 (2) The Clerk shall direct a copy of this Order to all counsel of record.

4 DATED this 21st day of June, 2006.

5
6
7 

8 RICARDO S. MARTINEZ
9 UNITED STATES DISTRICT JUDGE
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

26 ¹ Mr. Stanford was already deposed by plaintiff, and can be deposed again, according to defendants.
Furthermore, plaintiff has noted Ms. Barnett's deposition, although defendants have some concerns over the
scope of any deposition of Ms. Barnett. (Dkt.#16 at 6).